

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANA MARIA ARRATIA-MONTELONGO

Claimant

v.

NATIONAL BEEF PACKING COMPANY, LLC

Respondent

and

AMERICAN ZURICH INSURANCE COMPANY

Insurance Carrier

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) Docket Nos. 1,049,404;1,060,023;
) 1,070,879; 1,070,880
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ORDER

Claimant requests review of the June 13, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Claimant appears by Stanley R. Ausemus of Emporia, Kansas. Respondent and its insurance carrier (respondent) appears by Kerry E. McQueen of Liberal, Kansas.

ISSUES

The ALJ found claimant has reached maximum medical improvement (MMI), and denied her request for further medical treatment.

Claimant argues the ALJ's order is contrary to uncontroverted evidence and is an abuse of discretion. Claimant contends the opinions of Dr. Bieri, the court-ordered neutral physician, lack credibility because they were provided four months before claimant's latest left shoulder MRI scan. Claimant maintains her recent MRI showed a more prominent tear of the supraspinatus and infraspinatus tendons than previous studies, and that a current evaluation by Dr. Fluter concluded claimant required additional medical evaluation and treatment. Claimant insists the ALJ ignored the recent MRI findings, the testimony of claimant and the opinions of Dr. Fluter. Claimant requests the Board reverse the ALJ's decision.

Respondent argues the Board does not have jurisdiction to review the issues raised by claimant because the ALJ did not exceed her jurisdiction. Respondent also contends claimant did not establish her need for additional medical treatment. Respondent maintains claimant's symptoms were the same when she testified on June 10, 2016, as when Dr. Bieri examined her in October 2015, when the doctor concluded she had reached

MMI. Respondent requests the Board dismiss claimant's application for review for lack of jurisdiction, or affirm the ALJ's order on the merits.

The issues are:

1. Does the Board have jurisdiction to consider claimant's application for review?
2. Did the ALJ abuse her discretion by ignoring evidence and denying claimant's request for additional medical treatment?

FINDINGS OF FACT

Claimant has four claims pending against respondent:

1. In Docket No. 1,049,404, claimant sustained personal injury by accident to her right shoulder, arm and neck on October 22, 2009. This claim was settled on a "running award" basis on March 15, 2012.
2. In Docket No. 1,060,023, claimant alleges injury to her neck, back and right shoulder on March 9, 2012.¹
3. In Docket No. 1,070,879, claimant alleges injury to her left shoulder, left knee and low back on June 8, 2012.
4. In Docket No. 1,070,880, claimant alleges injury to her right wrist, right arm and both knees on July 15, 2014.

A preliminary hearing was held in all four claims on June 10, 2016. The sole issue was whether respondent should be ordered to provide additional medical treatment.² Claimant testified at the June 10 proceeding and exhibits, including medical reports, were admitted into evidence.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534a(a)(2) (Furse 2000) provides in part:

¹ At the June 10, 2016 preliminary hearing, counsel and the ALJ refer to the date of accident as March 5, 2012. P.H. Trans. at 6-7.

² In claimant's brief to the Board, she requests the order of the ALJ be reversed and that claimant be returned to Dr. Bieri, the neutral physician in all four claims, for further evaluation.

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2012 Supp. 44-534a(a)(2) provides in part:

A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given[,] or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2011 Supp. 44-551(i)(2)(A), provides in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

Jurisdiction is the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision, but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but also includes the power to decide it wrongly.³ When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the claim.⁴

There is no dispute the order of which review is sought is a preliminary hearing Order. The notion that the ALJ ignored evidence and abused her discretion is without basis. As the ALJ's decision makes clear, all evidence was considered, including claimant's testimony and all the exhibits admitted into evidence at the preliminary hearing. The judge had the authority to award or deny preliminary relief, including medical treatment. The ALJ did not act outside of her authority, and no jurisdictional issue as defined in K.S.A. 44-534a was raised before the ALJ or the Board. The Board accordingly must dismiss the appeals for lack of jurisdiction.

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P. 2d 552, rev. denied 221 Kan. 757 (1977).

⁴ *Berumen v. U.S.D.* 233, No. 1,067,401, 2014 WL 6863036 (Kan. WCAB Nov. 4, 2014).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSION

Claimant's application for Board review is dismissed for lack of jurisdiction.

DECISION

WHEREFORE, the Board finds claimant's application for Board review is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of September, 2016.

HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
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Honorable Pamela J. Fuller, Administrative Law Judge

⁵ K.S.A. 44-534a.